

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

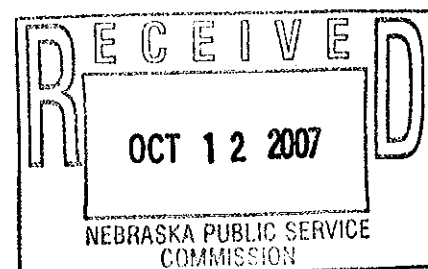
In the Matter of the Commission, on its own motion, to investigate jurisdictional issues pertaining to construction and operation of a natural gas pipeline within the state of Nebraska by Nebraska Resources Company, LLC, or any other entity.

**Doc. No. NG-0051/  
PI-130**

**CORNERSTONE ENERGY, LLC'S  
POST-HEARING BRIEF****INTRODUCTION**

On July 16, 2007, Nebraska Resources Company, LLC ("Nebraska Resources") requested that the Nebraska Public Service Commission (the "Commission") open an investigation to answer certain jurisdictional questions regarding the construction of an intrastate pipeline in Nebraska. On July 24, 2007, the Commission entered an Order Opening Investigation to investigate the jurisdictional questions raised by Nebraska Resources and an additional jurisdictional question developed by the Commission. On August 23, 2007, Cornerstone Energy, LLC ("Cornerstone") formally intervened in this proceeding.

On September 7, 2007, Cornerstone filed Comments on Investigation setting out its positions on the various jurisdictional questions at issue. Cornerstone commented that the Commission appeared to lack jurisdiction to consider an application by an intrastate pipeline under Neb. Rev. Stat. § 66-1853; that FERC is the more appropriate entity to regulate an intrastate pipeline; and that if the Commission takes jurisdiction of an intrastate pipeline, it must establish regulations which include open and non-discriminatory access. Cornerstone continues to assert these positions and incorporates them herein by this reference.



On September 25, 2007, a hearing was held on the investigation wherein Nebraska Resources presented, for the first time, certain information on its proposed pipeline. In addition, various formal interveners commented on the jurisdictional questions raised by the Commission, and various parties from the public provided statements in support of Nebraska Resources' proposed pipeline. In response to the information presented by Nebraska Resources in its comments and at the hearing, Cornerstone submits the following post-hearing brief.

### **DISCUSSION**

Pursuant to the Order Opening Investigation and various comments from the Commission, this investigation is not to relate specifically to Nebraska Resources' proposed pipeline, but is to apply generally to any proposed intrastate pipeline project. This investigation is also not an approval of Nebraska Resources' application to become a jurisdictional utility. Unfortunately, during the hearing, both Nebraska Resources and certain members of the public failed to keep their focus on the general jurisdictional issues before the Commission in this proceeding and presented information that related to the merits of the Nebraska Resources' project.

Cornerstone understands that Nebraska Resources' project was to provide some context for the Commission to address jurisdictional issues surrounding a proposed intrastate pipeline. However, Nebraska Resources' presentation went far beyond the proposed outline of its project. Nebraska Resources discussed, at length, the benefits its pipeline would provide to Nebraska and how important the pipeline is to the Norfolk area. These matters have nothing to do with whether or not the Commission has jurisdiction over an intrastate pipeline. Rather, these matters go directly to approval of

Nebraska Resources' application, which is not currently before the Commission.

Similar to Nebraska Resources, various members of the public offered statements regarding the importance of the proposed pipeline to Nebraska and specifically the Norfolk area. While these comments may be appropriate if an application is submitted by Nebraska Resources, they are not appropriate at this stage of the proceeding.

Cornerstone is confident that the Commission will disregard the irrelevant information in reaching its decision on the jurisdictional issues before it. However, due to the large amount of inaccurate information presented in support of Nebraska Resources' proposed pipeline, Cornerstone feels that it has no choice but to briefly address certain inaccurate information that was presented at the hearing. Before doing so, however, Cornerstone affirmatively reasserts that it is not against the construction of an intrastate pipeline in Nebraska per se and may very well benefit from the construction of such a pipeline. Cornerstone simply believes that such a pipeline must be properly regulated by a governmental body having jurisdiction to do so and that such regulation should include open and non-discriminatory access to the pipeline.

**I. Inaccurate Information Presented at the Hearing.**

**a. The Proposed Nebraska Resources' Pipeline Will Not Timely Solve The Natural Gas Shortage In Norfolk.**

A great deal of time was spent at the hearing on the benefit the proposed pipeline would have on the Norfolk, Nebraska community and the shortage of natural gas the community is currently experiencing. The Nebraska Resources' pipeline will not solve this problem. Mr. Frey, President of Nebraska Resources, admitted at the hearing that "we're also actively working on a Phase II expansion to Norfolk. It probably will not

be in our initial filing but something we're having extended discussion on with potential shippers in the Norfolk area." (T17, 5-9). Based on Nebraska Resources' own admission, a current plan to expand to Norfolk does not exist and if such expansion occurs, it will not occur until Phase II of the project. This does nothing to remedy Norfolk's current natural gas shortage. As a result, an alleged benefit to Norfolk should not be a basis for the Commission to determine it has jurisdiction over the proposed pipeline.

b. The First Rate Case Had Regulation.

At the hearing, it was alleged that the first rate case of Aquila handled by the Commission was done so without rules and regulations. Chris Dibbern, general counsel for NMPP Energy stated that, "[y]ou may recall that in your first rate case of Aquila, you adopted that rate case without rules and regs. And you've also adopted many other new elements of LB-790 as you've dealt with the first case. So I didn't want that to be a barrier to stopping your applications." (T89, 5-11).

The first rate case was not conducted without rules and regulations. As the Commission well knows, Nebraska statutes provide numerous regulations for rate cases and rules that must be followed in such cases. See Neb. Rev. Stat. §§ 66-1808, 66-1825, etc. While it is true that certain procedures were adopted and ironed out through the first rate case, it certainly cannot be said that the case was handled without any rules and regulations.

Although the Nebraska Revised Statutes provide a great deal of guidance for handling rate cases, quite the opposite is true for the regulation of intrastate pipelines. If the statutes grant jurisdiction to the Commission for regulation, which Cornerstone

does not believe they do, the statutes provide virtually no direction on regulation. As a result, comparing the development of procedures during the first rate case of Aquila handled by the Commission to the development of rules and regulations through approval of the first intrastate pipeline application is comparing apples to oranges.

c. The Nebraska Administrative Procedures Act Requires The Commission To Adopt Formal Rules To Regulate Intrastate Pipelines.

In order for the Commission to properly regulate an intrastate pipeline, extensive rules and regulations would have to be developed before the first application is approved and not through the approval of the first application. The Nebraska Administrative Procedures Act, which governs the adopting of rules by administrative agencies, provides the guidelines for adopting such rules and regulations.

Neb. Rev. Stat. § 84-907 (2005) provides that:

No rule or regulation shall be adopted, amended, or repealed by any agency except after public hearing on the question of adopting, amending, or repealing such rule or regulation. Notice of such hearing shall be given at least thirty days prior thereto to the Secretary of State and by publication in a newspaper having general circulation in the state. All such hearings shall be open to the public.

Pursuant to § 84-907, the Commission must hold a public hearing on the rules and regulations it wishes to adopt. According to the plain language of the statute, the public hearing must be on the adoption of the rules and regulations and not wound up in an application approval proceeding.<sup>1</sup> As a result, a separate rulemaking proceeding would be required for regulation of an intrastate pipeline.<sup>2</sup>

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<sup>1</sup> See also the remainder of the Administrative Procedures Act for additional requirements regarding the adoption of rules and regulations by an administrative agency, including, but not limited to, § 84-907.04 setting out content requirements for an explanatory statement.

<sup>2</sup> Cornerstone acknowledges that under certain circumstances the Commission could utilize alternatives for rulemaking under the Administrative Procedures Act, but to do so requires procedures to be followed and not an adoption of rules and regulations through the approval of an application.

Not only would this separate rulemaking procedure be required pursuant to § 84-907, it would also likely be necessary in order for the pipeline to qualify as a Hinshaw pipeline. In order for a pipeline to qualify as a Hinshaw pipeline, "the rates and service of such person and facilities" must be subject to regulation by the Commission and the Commission must be exercising its regulatory authority. 15 U.S.C.A. § 717(c) (2005). Thus, for a pipeline to qualify as Hinshaw pipeline, the Commission must be regulating the rates and services of the pipeline facilities. If the Commission has no rules regulating an intrastate pipeline, it cannot certify to FERC that it is exercising its regulatory authority. To do so would invalidate the prerequisite for a Hinshaw exemption, which is active regulation at the state level.

Due to the necessity for extensive rules and regulation if the Commission takes jurisdiction over an intrastate pipeline, the resources of the Commission must be considered. Nebraska Resources alleged that it would incur the cost of various environmental studies and therefore, take the burden off of the Commission's resources, if the Commission takes jurisdiction. (T68, 19-24). Regardless of whether Nebraska Resources provides the funding for an environmental study or not, the Commission will still have to expend significant time and resources to develop the rules and regulations relating not only to environmental matters, but to all matters relating to the pipeline. The Commission will then need to determine if such regulations are satisfied by the studies that are conducted. As a result, the Commission will be forced to incur expenses and find new resources to assist in the regulation of the pipeline.

- d. FERC Approval Would Likely Not Take Longer Than Commission Regulation.

Nebraska Resources claims that if the Commission does not take jurisdiction of

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the proposed pipeline, the project will likely not survive if application to FERC is pursued because of the extended amount of time involved to receive FERC's approval. At the hearing, information was presented that construction projects can be approved by FERC in as little as seven months. (T103, 7-13). It is difficult to see how the Commission, with the need to develop regulations and interpret environmental studies, could approve an application in less time. As a result, Nebraska Resources' claim that it needs a decision more quickly than FERC can provide does not seem to be remedied by Commission regulation and should not be a basis for the Commission to take jurisdiction.

e. A FERC Limited Jurisdictional Certificate Is Not Appropriate In The Present Case.

Nebraska Resources insists that it needs an immediate decision from the Commission for its project to survive, yet it claims it has sufficient time to seek regulation of high-volume ratepayers from FERC. According to Nebraska Resources, due to the lack of Commission regulation of high-volume ratepayers, Nebraska Resources would apply for a limited jurisdictional certificate from FERC to govern only the high-volume ratepayers. Nebraska Resources claims that FERC would apply the rates of similarly situated ratepayers in Nebraska to determine the rates of the high-volume ratepayers. However, because the Commission does not regulate high-volume ratepayers, there are no established rates for high-volume users in Nebraska.

Although Nebraska Resources did not explain its legal basis for a limited jurisdictional certificate from FERC, it seems likely that Nebraska Resources would seek the certificate under FERC Order No. 63 or a similar FERC order which contemplates dual regulation. While Cornerstone does not concede that such a certificate would be

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appropriate, due to the lack of an actual application, Cornerstone must assume that such an order would be the basis of the certificate.

Under FERC Order No. 63 and similar orders which contemplate dual regulation, the rates for the FERC regulated portion of the pipeline result from the pipeline electing "rates for comparable service approved by its state utility commission, design its rates based on the methodology approved by its state utility commission for its intrastate rates, or allow FERC to set the rates." *ANR Pipeline Co. v. F.E.R.C.*, 71 F.3d 897, 898-99 C.A.D.C. (1995). Based on Nebraska Resources' statements at the hearing, Nebraska Resources would elect "rates for comparable service approved by its state utility commission." However, Nebraska, unlike other states, does not have rates for comparable service because high-volume ratepayers are unregulated. As a result, the rates for high-volume ratepayers will have to be set by FERC, which is much more complicated than the adoption of established rates. Due to the complex nature of the rate structure that will need to be developed by FERC for high-volume ratepayers, it is logical that FERC govern the entire pipeline. To do so will prevent a drain on the Commission's resources and streamline regulation of the pipeline.

f. Nebraska Resources Wants Only Limited Regulation Of Its Proposed Pipeline.

Based on the information discussed above which highlights the inaccuracies in Nebraska Resources' positions, it seems that the main reason Nebraska Resources asserts the Commission should take jurisdiction has nothing to do with timing or a desire to benefit Nebraska, but rather has to do with a desire for little, if any, regulation or oversight. Nebraska Resources is asking this Commission to take jurisdiction of this pipeline on an expedited basis without proper regulations being in place. To do so,



allows Nebraska Resources to build a pipeline with little interference from the government and freedom to benefit its associated entities. This is contrary to the purposes of both FERC and the Commission and should not be allowed.

## **II. The Jurisdictional Questions Actually Before the Commission.**

Having now addressed the inaccurate information presented at the hearing, Cornerstone will address the jurisdictional issues actually before the Commission.

### **a. Local Distribution Companies With Volumetric Demand In Excess Of 500 Therms Per Day Do Not Constitute High-Volume Ratepayers.**

The first question posed by the Commission in its Order Opening Investigation is "does the definition of 'high-volume ratepayer' in *Neb. Rev. Stat. Sec. 66-1802(7)* include LDCs with volumetric demand in excess of 500 therms per day?" As discussed in Cornerstone's Comments on Investigation previously submitted to the Commission, LDCs do not constitute high-volume ratepayers. As Cornerstone's position on this issue has not changed, Cornerstone incorporates herein its arguments contained in its Comments in response to this question.

### **b. Double-Piping.**

The second question posed by the Commission in its investigation is "does Nebraska's double-piping prohibition under *Neb. Rev. Stat. Sec. 66-1852* apply to a pipeline providing a new interconnection to an LDC?" As stated in Cornerstone's Comments, which are hereby adopted and incorporated herein, a general double-piping question cannot be answered. Although Nebraska Resources has presented an outline of its proposed pipeline since Cornerstone filed its original comments, Nebraska Resources did not provide a diagram of how its pipeline would interlay with the existing pipeline structures in Nebraska and as a result, an affirmative determination on double-

pipng cannot be made.

- c. The Commission Does Not Clearly Have Jurisdiction Over An Intrastate Pipeline.

The third question proposed by the Commission is "does the Commission have jurisdiction over an Application under *Neb. Rev. Stat. Sec. 66-1853(1)* for a Certificate of Public Convenience to operate as a 'jurisdictional utility' a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?" The Commission does not clearly have jurisdiction over an application under § 66-1853(1) relating to an intrastate pipeline because an intrastate pipeline is not clearly a "natural gas public utility" and the legislative history of the Nebraska State Natural Gas Regulation Act does not discuss an intrastate pipeline. In order to conserve the Commission's time, Cornerstone's positions regarding these arguments will not be readdressed here, but are rather incorporated herein from Cornerstone's Comments.

In addition to the arguments incorporated from Cornerstone's Comments, Cornerstone asserts the following argument as a basis for the Commission's lack of jurisdiction over an application under § 66-1853. It appears that an intrastate pipeline falls into the definition of a carrier under 291 Nebraska Administrative Code, Ch. 9, § 001. Section 001 defines a carrier as "any person, company, corporation, limited liability company, joint venture, partnership, political subdivision, or association transporting, transmitting, conveying, or storing any liquid or gas by pipeline for hire in Nebraska intrastate commerce." See also *Neb. Rev. Stat. § 75-501*. The code separately defines a jurisdictional utility as "a natural gas public utility subject to the jurisdiction of the commission." *Neb. Rev. Stat. § 66-1802(10)* (2003). A natural gas public utility includes entities that control, operate, or manage equipment, plants, or

machinery used for the conveyance of natural gas through pipelines in or through any part of the state. Neb. Rev. Stat. § 66-1803(11) (2003). Thus, due to the fact an intrastate pipeline appears to be a "carrier" and not a natural gas public utility, the Commission does not have jurisdiction to issue a certificate of public convenience to an intrastate pipeline as a jurisdictional utility. This is true because to be a jurisdictional utility, you must be a natural gas public utility.

d. A Variety Of Other Regulatory Authorities Would Be Involved In The Construction Of The Pipeline.

The final question asked by the Commission is "what other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?" As mentioned in Cornerstone's Comments, FERC would clearly have jurisdiction. In regard to other regulatory authorities, a number would be involved. Due to the fact that these regulatory authorities were discussed at length at the hearing, Cornerstone will not comment further on these regulatory authorities.

### **CONCLUSION**

Cornerstone is not opposed to the construction of an intrastate pipeline if its regulated by the proper authority. Due to the fact that the Commission does not clearly have jurisdiction of an intrastate pipeline and lacks the resources to regulate such a pipeline, regulation should be left to FERC. In addition, Nebraska Resources' inaccurate information presented at the hearing should not influence the Commission to take jurisdiction of an intrastate pipeline. In the event that the Commission decides to take regulation of an intrastate pipeline, it must develop comprehensive regulations to govern the pipeline and to ensure open and non-discriminatory access to all who wish

to utilize the pipeline.

DATED this 12<sup>th</sup> day of October 2007.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12<sup>th</sup> day of October 2007, a true and correct copy of the foregoing Cornerstone Energy, LLC's Post-Hearing Brief was served upon the following by regular U.S. Mail, postage prepaid, properly addressed as follows:

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